

RECEIVED

OCT 28 2004

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL**

04- 22 WC

**IN RE: ROBERT CHAPMAN and CHAPMAN SCRAP METAL RECYCLING
FILE #2004-01674
Milan, NH**

DENIAL OF REQUEST FOR SHORELAND PROTECTION VARIANCE

04- 22 WC

NOTICE OF APPEAL

This is an appeal of the Department of Environmental Services ("DES") decision, dated September 28, 2004, by Robert Chapman ("owner") and Chapman Scrap Metal Recycling, a property ("property") located in Milan, New Hampshire at East Side River Road, 20 Wyman Drive, and filed by their counsel in this matter.

1. By letter dated September 28, 2004, post-marked October 6, 2004 and received on October 9, 2004, DES denied Robert Chapman's application for a variance from a minimum standard set forth in RSA 483-B:9.

2. At the property, non-ferrous scrap metal is recycled and has been at this location since 1988. Part of the property is located within 250 feet of the Androscoggin River.

3. On July 8, 2004, Owner filed with the Wetlands Bureau of the New Hampshire Department of Environmental Services ("Department"), a Request for a Shoreland Variance (the "Variance Request") pursuant to RSA 483-B:9, V. The Variance Request seeks relief from the provisions of RSA 483-B:9, IV generally prohibiting the placement of solid waste within 250 feet of the reference line of public waters. For easy reference by the Council, a copy of the Variance Request (without the accompanying Site Plan) is attached hereto as Exhibit A, and is available in the DES file.

4. The sole basis for denial of the variance that is presented in the Department's decision dated September 28, 2004, is a legally incorrect determination that "[t]he Commissioner has not been granted the authority to grant variances of any portion of RSA 483-B:9 with the exception of the minimum standards within section V." A copy of the Department's decision is attached hereto as Exhibit B.

BASIS FOR APPEAL

5. The Department's decision is clearly erroneous as a matter of law. The State Shoreland Protection statute, RSA 483-B, provides the Commissioner with the "authority to grant variances from the minimum standards" of RSA 483-B:9 including, but not limited to, the minimum setback requirements in RSA 483-B:9, IV-d. RSA 483-B:9, V(g) [emphasis added].

6. Furthermore, on information and belief, the Department has interpreted this statute as conferring the legal authority to grant such variances from the minimum standards of RSA 483-B:9.

7. If the variance were not granted, it appears the property would be constitutionally protected as a pre-existing non-conforming use with respect to the provisions of this statute.

8. Finally, there is and has been no request by the owner or the property to expand the area used in the business, contrary to the "Finding of Fact" contained in the Department's decision.

WHEREFORE, the owner respectfully requests that the Department's decision, dated September 28, 2004, be reversed because it is clearly incorrect as a matter of law, and that this case be remanded to the Department for consideration of the Request for Variance on its merits.

Respectfully submitted,

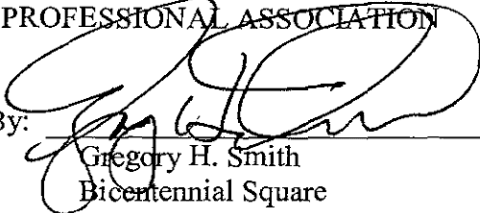
ROBERT CHAPMAN

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: 10/28/04


By:



Gregory H. Smith
Bicentennial Square
Fifteen North Main Street
Concord, NH 03301
Telephone (603) 226-0400
FAX: (603) 230-4448

Date: 10/28/04

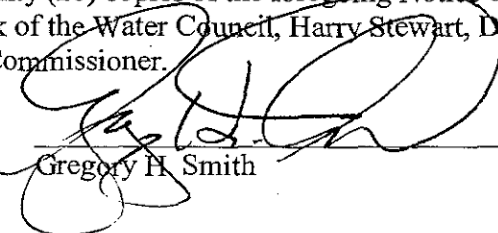
By:



Philip T. McLaughlin
McLaughlin Law Office, P.C.
501 Union Ave.
Laconia, NH 03246
Telephone (603) 528-6953
FAX: (603) 528-6955

Certificate of Service

I, Gregory H. Smith, hereby certify that on the 28th day of October, 2004, I caused to be hand delivered an original and twenty (20) copies of the foregoing Notice of Appeal to Michael Sclafani, Appeals Clerk of the Water Council, Harry Stewart, Director Water Division, and Michael P. Nolin, Commissioner.



Gregory H. Smith

Exhibit A



Request for Shoreland Variance RSA 483-B:9, V(g)

Wetlands Bureau
P.O. Box 95, 29 Hazen Drive
Concord, NH 03302-0095

GENERAL INSTRUCTIONS: Type or print clearly; missing information may delay your request. Use a separate form for each variance requested.

1. NAME OF OWNER: Chapman, Robert

Last

First

Middle

MAILING ADDRESS: PO Box 64, Milan NH 03588

Street/Box #

Town/City

State

Zip

603-449-2474

603-449-2463

TELEPHONE

FAX

EMAIL

2. LOCATION OF PROPERTY FOR WHICH A
VARIANCE IS BEING REQUESTED:

East Side River Road

Milan, NH

Street/Box #

Town/City

TAX MAP #s: 46

LOT #s: 48

BLOCK #s:

3. NAME OF WATERBODY:

Androscoggin River

4. NAME OF APPLICANT:

(If different than owner)

Last

First

Middle

MAILING ADDRESS:

Street/Box #

Town/City

State

Zip

TELEPHONE

FAX

EMAIL

5. DESCRIPTION OF VARIANCE REQUESTED:

STANDARD: RSA 483-B:9, V (e.g. RSA 483-B:9, V(b)(2)(A)(i) says the leachfield must be 125 feet from the reference line.)

RSA 483-B:9, 1V-d

HOW DO YOU WISH TO VARY FROM THIS
STANDARD? Briefly describe the relief requested. (e.g.
"Setback of less than 125 feet from reference line for septic
system," RSA 483-B:9, V (b)(2)(A)(i).")

Setback of less than 250 feet from
reference line of the Androscoggin River

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P. 002/002

6. JUSTIFICATION FOR THE VARIANCE: On separate pages, provide documentation of the reasons for the necessity of the requested variance. Plans and photographs should be attached as part of your explanation. Describe what reasonable use of your property you would be denied if you had to comply with the literal meaning of the standard. An example would be a lot-of-record in which the only reasonable location for constructing a septic system is closer to the reference line because of the physical features of the property. Your narrative must address each of the following points:

- *The literal enforcement of the standard would result in an unnecessary hardship.* To establish unnecessary hardship you must prove that the standard for which you are requesting the variance:
 1. Would interfere with the reasonable use of the property, considering the unique setting of the property in its environment.
 2. Has no fair and specific relationship between the general purposes of RSA 483-B and the restrictions on your property.
 3. Does not injure the public or private rights of others when applied to your property.
- *Granting a variance will not result in the diminution in value of surrounding properties.* You must demonstrate that granting the variance would not cause diminution of surrounding property values. To do this, you must show that the variance is consistent with the existing neighborhood and adjoining shoreline, will not result in a nuisance, and will not diminish the reasonable use of neighboring properties.
- *The variance would not be contrary to the spirit of RSA 483-B.* RSA 483-B:2 declares that the standards are necessary to protect the public waters of the State of New Hampshire, and lists 16 specific purposes for those standards. You must show that a variance, as applied to your specific property, would not be contrary to any of those purposes.
- *Granting variance would not be contrary to the public interest.* The public waters of New Hampshire are valuable resources held in trust by the State, and the public has an interest in protecting those waters and shorelines from degradation. You must show that a variance would not interfere with the greater public benefit.
- *Granting variance would do substantial justice.* You must show that granting the variance would be a fair and reasonable decision. One way to do this is to show that, in combination with mitigating measures, the net result will have the same or greater protection for the public water as meeting the standard itself. Mitigating measures include providing additional protections above and beyond the minimum standards. For example: Re-establishing a natural woodland buffer along a section of shoreline that was cleared prior to the enactment of RSA 483-B could be used to balance the impact of a septic system being built closer to the public water. Merely meeting the requirements of another standard or jurisdiction would not be considered a mitigating measure.

7. SIGNATURES: The signature(s) below certifies that a copy of this application, with all attachments, has been provided to the municipal conservation commission in the city or town where the property is located (or selectmen if there is no conservation commission), and that the information provided is true and accurate.

OWNER

Robert A ChapmanDate 7-8-04

APPLICANT

If different than owner

Date

Page 2 of 2

Please print single sided

REV 4-8-04

Justification for the Variance

The setback requirement of 250' from the reference line of the Androscoggin River (river) is provided in the Comprehensive Shoreland Protection Act (Chapter 483-B) as a standard measure to protect public waters in the State of New Hampshire. In the case of the existing Chapman Scrap Metal Recycling (Chapman) facility in Milan, New Hampshire, a site-specific setback may be more appropriate due to the unique characteristics of the Chapman property (site). Chapman is a recycler of scrap metal. The facility receives, sorts and bales and/or re-packages recyclable non-ferrous scrap metals. Examples include (but are not limited to) telephone wire reels from public and private sources, copper pipe and wire, stainless steel, scrap aluminum, box trailers, mixed metal scraps and turnings. Provided below is a summary of the reasons for the requested variance.

The literal enforcement of the standard would result in an unnecessary hardship.

1. The area of the site which would be rendered unusable by the 250' restriction is approximately 3 acres, slightly more than 30% of the site (see attached **Site Plan**). Scrap metal recycling facilities succeed by stockpiling materials when the market price is low and selling when the price is high. Limiting the usable area of the site could therefore directly impact the viability of Chapman's business.
2. The site is subject to a glide path easement due to its proximity to the Berlin Municipal airport. The only area of the site which is outside of the airport glide path is the southwest corner, the same portion of the site which is within the 250' setback (see **Site Plan**). Burning of scrap wood, which is a necessary part of the operations, should continue to be done outside the glide path. Burning occurs several times per year in accordance with fire permits.

Granting a variance will not result in the diminution in value of surrounding properties.

1. The area of the site within the 250' setback is not noticeable (i.e., cannot be seen) from neighboring properties including the river because of the existing embankment (see **Site Plan**).
2. Chapman has been operating at this site since 1988, and has had no known complaints about its operations from neighbors, town officials, or the nearby airport. The property to the south of Chapman Metals contains a gravel pit, maintenance garage and a logging equipment storage area.
3. Operations at the site create minimal noise and no dust or odors. Other than baling, there is no processing (i.e., crushing, smelting, etc.) of metals or other materials at the Site.
4. The materials handled at the site do not attract insects or rodents.

Chapman Scrap Metal Recycling
Milan, New Hampshire
Request For Shoreland Variance
Page 2

The variance would not be contrary to the spirit of RSA 483-B.

1. Because of the type of facility (minimal impact to the environment) and the existing site features (i.e., embankment), continuing the operation with a portion of the facility within the 250' setback should not:

- cause water pollution;
- affect fish spawning grounds, aquatic life, and bird and other wildlife habitats along the river;
- affect public use (i.e., recreation) of the river; or
- impact natural beauty along the river.

Granting variance would not be contrary to the public interest.

1. Continuing the operation with a portion of the facility within the 250' setback will not interfere with the public benefit of the river, because:

- the facility cannot be seen from the river, nor can the operation be heard on the river;
- no buildings currently exist or are proposed for the area within the 250' setback;
- the operations at the site are protected by the existing high embankment; and
- the portion of the facility within the 250' setback is not within the 100-yr. floodplain.

Granting variance would do substantial justice.

1. Maintaining the embankment on the site will provide for greater protection of the river than a standard 250' setback, because:

- the embankment's prevent stormwater runoff at the site from discharging into the river; and
- the embankment prevents noise from being heard on the river.

Exhibit B



The State of New Hampshire
Department of Environmental Services

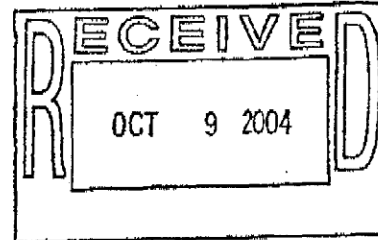


Michael P. Nolin
Commissioner

September 28, 2004

Robert Chapman
PO Box 64
Milan, NH 03588

RE: File #2004-01674 - Robert Chapman - Milan
Tax Map 46 Lot 48;



Dear Mr. Chapman:

The Department of Environmental Services (DES) Wetlands Bureau has completed its review of your application for a variance of RSA 483-B:9 IV-d, prohibiting the placement of solid waste within 250 ft of the reference line of a public water and determined that the request does not comply with the statute. The application has therefore been denied.

This decision was determined based on the following findings:

Findings of Fact

1. On July 21, 2004 the Department received your after-the-fact request to expand the area used for the storage of recyclable solid waste on property identified as Milan Tax map 46, lot 48 into areas within 250 feet of the reference line of a public water.

Standards for Approval

2. In accordance with RSA 483-B:9, IV-c, "An existing solid waste facility which is located within 250 feet of the reference line of public waters under this chapter may continue to operate under an existing permit, provided it does not cause degradation to an area in excess of that area under the permit."
3. In accordance with RSA 483-B:9, IV-d, "No solid waste facility shall place solid waste within 250 feet of the reference line of public waters under this chapter except as expressly permitted under RSA 483-B:9, IV-c. However, any solid waste facility may be allowed, subject to the permitting conditions under RSA 149-M:10, to erect accessory structures and conduct other activities consistent with the operation of the facility within 250 feet of the reference line of the public waters under this chapter, such as filling, grading and installing monitoring wells and other drainage structures as is consistent with its solid waste permit as issued as issued by the department of environmental services. Under no circumstances shall the toe of any slope encroach within 150 feet of the reference line."
4. In accordance with RSA 483-B:9, V(g), "The commissioner shall have the authority to grant variances from the minimum standards of this section." The authority to grant variances is not extended to any other minimum standard described in RSA 483-B:9.

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095

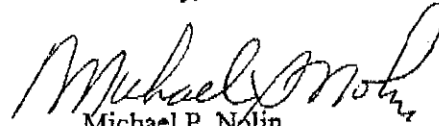
Telephone: (603) 271-3503 • Fax: (603) 271-2982 • TDD Access: Relay NH 1-800-735-2964

Ruling in Support of the Decision

5. The commissioner has not been granted the authority to grant variances of any portion of RSA 483-B:9 with the exception of the minimum standards within section V. Therefore the request for variance of RSA 483-B:9, IV-d is denied.

You are hereby informed that the appeal of this decision is to the New Hampshire Waste Management Council. Appeal must be made within 30 days of the date of this letter, in accordance with RSA 149-M, RSA 21-O:9 and RSA-O:14. Filing of the appeal shall be made by certified mail to the chairperson of the council, with a copy to the Department, and shall set forth fully every ground upon which it is claimed that the Department's decision is unlawful or unreasonable.

Sincerely,



Michael P. Nolin
Commissioner

cc: Milan Board of Selectmen
Milan Municipal Clerk
Scott Collins, PE, St Germain & Associates, Inc